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ORIGIN AND DEVELOPMENT OF TRIAL BY JURY.

SOME one has said that the whole establishment of king, lords and commons, and all the laws and statutes of England, have for their one great object the bringing of twelve men into a jury-box. From a practical standpoint, the statement is not an exaggeration. Governments are instituted for the purpose of securing and perpetuating the inalienable rights of life, liberty and the pursuit of happiness, and both in this country and in England the twelve men in the jury-box are the great court of appeal, for the humblest as well as the most exalted, when any of those rights are violated or assailed.

Trial by jury is not only the distinguishing feature of our legal fabric, as compared with that of other nations, but it is the crowning masterpiece of our jurisprudence. Evolved through the weary length of many centuries, and gradually superseding older forms of trial that were far more popular in the earlier periods of their contemporary existence, it has developed into an institution of marvelous efficiency, and is regarded by many as the apotheosis of the judicial investigation and determination of disputes.

The jury system appeals with peculiar force to the great masses of the common people. To them, it is something more than a mere means for enforcing criminal statutes and settling private controversies. Inspired by the rich heritage of the common law, and by the history of the long struggle of the English people for civil liberty, they revere the jury organization as the very Ark of the Covenant, which not only contains the tables of

the law, but brings those laws down to the level of their own comprehension, and makes them speak, so far as their interpretation and execution is concerned, through the voice of the "country-side," the voice of the people themselves. Trial by jury, therefore, is justly prized as the corner-stone of our free institutions. It shields individual rights from the encroachment of governmental power; it imbues the ordinary citizen with the principle of magistracy, and gives him an important part in the administration of governmental affairs; and it makes the people of a state the keepers of the conscience of the laws of that state, for a law can only be enforced according to their conception of its justice, goodness and moral strength. But above all, the jury system is especially dear to the heart of the masses, because service on the jury is the simple but transfiguring ceremony in which the shoulder of every citizen, whatever the accident of his birth or station, tingles with the accolade of that matchless precept of the law that all men are born free, equal and independent.

It is an interesting fact that while trial by jury is the pride of the English law, and is esteemed by the people as the palladium of their liberties, it is, in its origin, not English but Frankish, not popular but royal. The development of the jury furnishes one of the most conspicuous instances in history of the gradual transformation of the offensive sword of royal prerogative into the defensive excaliber of popular rights.

When Charlemagne had wearied of conquest, after making himself the master of almost the whole of continental Europe, he undertook the higher emprise of constructive statesmanship, and it was his genius in this respect, rather than as a soldier, that made his life an epoch in universal history. The means employed by him for keeping in touch with local conditions throughout his vast dominions was the germ which, through the slow process of political evolution, eventually expanded into trial by jury. The plan was to send commissioners at stated intervals to every community in the realm, whose duty it was to procure full information from the inhabitants of all matters pertaining to the administration of public affairs. The connection

between these commissioners and the jury may be attenuated, but it is none the less real.

After the death of Charlemagne, that part of his empire which lay west of the Rhone and the Meuse, then occupied by the Franks and destined to become France, was allotted to his second son, Charles. He and the Frankish kings who succeeded him accomplished so little of note that it might be said of them, as Napoleon said of the Merovingians, "What an effort for half a page of history!" And yet, they contributed an important process in the evolution of trial by jury. This was through the development of the *inquisitio,* or the inquest of twelve men in each community who were compelled to furnish on oath the same information which, under the system inaugurated by Charlemagne, itinerant commissioners had formerly been appointed to obtain.

The inquisition was a very vigorous and searching exercise of kingly power. The practice was to summon together by public authority a group of people who were most likely, as neighbors, to know and tell the truth, and to call for their answer under oath. The inquest, which was really a jury of twelve men, was required to declare what rights the king had or ought to have in the district; what lands belonged to him, and what return he should receive from them; and what services were due from the inhabitants to the crown. The inquest was also required to inform the king whether any of his officers were guilty of misconduct, and whether there had been any murders, robberies or other grave crimes which threatened the king's peace, and, if so, what parties were suspected of them. In these and similar matters of public administration, the Frankish king placed himself outside the formalism of the old folk-law, and claimed, as a royal prerogative, the right to rely on the verdict of neighbors, instead of on the battle, or on trial by ordeal.

It must not be imagined, however, that the Frankish inquisition, though the parent of trial by jury, had any connection with the ordinary procedure of the Frankish courts. Those courts knew only such antique modes of trial as the battle, the ordeal and the oath with oath helpers. The inquest never be-

came associated with judicial procedure under the Franks, nor indeed under the French, and trial by jury as we know it has never existed in France. It was only when the inquisition had been transplanted in English soil that it began that curious and remarkable growth which ripened into the jury as it exists today.

The inquisition was in full operation among the Franks at the date of the invasion of the Northmen. Those hardy adventurers began their raids before the death of Charlemagne, and afterwards they came in such increasing numbers that the Frankish kings could not beat them off. Finally, in the early part of the tenth century, Charles the Simple granted to Rollo, the leader of the Northmen, a large territory in the north of Gaul, on condition of homage and the acceptance of Christianity. In a short time the newcomers had adopted the language, the manners and the religion of the Franks, their name was softened from Northmen to Norman, and their country became known as Normandy.

The Norman dukes were not slow in adopting those political institutions of the Franks which lengthened the arm of the royal prerogative. During the century and a half between the settlement of Normandy and the conquest of England, they became thoroughly familiar with the Frankish inquisition, and employed it as a powerful agency in governmental affairs. They extended its operation to a variety of new subjects, and it eventually became an established part of their administrative machinery for doing all sorts of transactions of a public nature.

When the Normans invaded England, they carried the inquisition with them. One of the first acts of William the Conqueror was to have a census taken of the people, lands, conditions and affairs of his new possessions. That great fiscal record known as Doomsday Book was largely compiled from the verdicts of inquests. Taxes were laid, services exacted, personal status fixed, customs ascertained and defined, and the title and right of possession of demesne lands determined by the sworn answer of selected persons of the neighborhood. In rare instances the crown bestowed on some favored church the right to protect its lands by inquest, so that the bishop, when his title

was attacked, could put himself upon the verdict of his neighbors instead of abiding the risk of a judicial combat; and in some cases the right of inquest was sold to rich and powerful nobles, and thus became a source of royal revenue. But the institution never lost its character of royal prerogative until a century after the Conquest, when Henry II promulgated those wonderful constitutions which worked a revolution in the law of procedure, and really made him the father of trial by jury, though the honor of such an appellation has never been accorded to him.

Henry II was the great grandson of William the Conqueror, and the first of the Plantagenets. Though he became king of England at the age of twenty-one, he had already ruled as a duke of Normandy, and had acquired considerable experience in the science of government. With a stout square frame, prominent eyes, bull neck, course big hands and bow legs, he was a man of tremendous physical force, who neither rested himself nor allowed others to rest. He possessed a vigorous mind, a strong memory and a will-power that was like a bar of steel. Without the least trace of imagination, and utterly lacking in reverence, he was practical to the last degree, and he mounted the throne with the resolute purpose of inaugurating practical reforms, especially in administrative and judicial affairs.

The first judicial reform grew out of a class of disputes in which the claims of the church conflicted with the claims of the State. The church contended that litigation about lands which had been given by way of alms to God and the saints should come before the spiritual courts. But the preliminary question always arose whether the land was alms fee or lay fee, and this question could not with propriety be submitted either to the church or to the crown, for neither should be the judge in its own cause. In this predicament, Henry thought of the inquisition. The people were outsiders, so to speak, and the voice of the country-side would be impartial. Henry, therefore, declared that the issue should be decided by the oath of an inquest, that is of a jury, in the presence of his justiciar. This gave rise to the assize *utrum,* a writ or remedy under which a jury of twelve lawful men was to decide whether (*utrum*) the land in question

was alms or free. This was probably the first use of the inquest or jury in common practice.

At the great council of nobles held at Clarendon in 1166, Henry provided by royal edict for a procedure which became known as the assize of *novel disseisin.* It was this: If any person was disseised of his free tenement without a judgment, he was to have a remedy by royal writ. A jury was to be summoned, and it was to answer, in the presence of King's justices, the simple questions of seisin and disseisin. If the verdict was for the plaintiff, he was to be restored to his possession. The theory of the proceeding was that possession, as something distinct from ownership or title, ought to be protected by a speedy and effective remedy.

The assize of *novel disseisin* was the immediate parent of trial by jury. In his effort to transform the inquest into a method of settling private disputes, Henry could not have selected a more suitable class of cases in which to introduce the reform than the possessory actions for real property. We can hardly appreciate the importance which was attached to possession in those early times, and actions of this character were not only numerous, but they attracted the attention of almost every one in the county.

The new procedure, that is of *novel disseisin,* was an irreverent assault upon the most ancient customs and traditions of that day. It was such a radical departure from the established modes of trial that even the lawyers had difficulty in adjusting themselves to it, and Bracton says that many wakeful nights were spent over it. Yet it was so intrinsically fair, just and efficient, as compared with the brute hazard of battle or with the superstitious chance of compurgation, that its ultimate appeal to popular favor, and its gradual extension to other classes of cases, were alike inevitable.

After fairly launching the assize of *novel disseisin,* Henry went further, and decreed that no man need answer for his free tenement without a royal writ, and that in a proprietary action for land in a feudal court, in which the trial was by battle, the defendant might have the whole proceeding removed into the king's court, and the question of title determined by a ver-

dict of neighbors. In this case the inquest was called the *grand assize.*

To realize what a wonderful advance was effected by the substitution of the *grand assize* for wager of battle as a mode of trying title to land, it is only necessary to consider the actual details of a trial by battle.

When issue was joined on a writ of right, a piece of ground sixty feet square was enclosed with lists, with a stand for the judges of the court of common pleas, who attended in their scarlet robes, and a bar for the learned serjeants at law. On the sitting of the court, which was at sunrise, a proclamation was made for the parties and their champions, who thereupon entered the arena and were introduced by two knights. The champion of the tenant took his adversary by the hand and made oath that the land in dispute was not the land of the demandant, and the champion of the demandant took the other by the hand and swore that it was. Each then took an oath against sorcery and enchantment in the following form: *"Hear this, ye justices, that I have this day neither eaten nor drunk, nor have upon me any bone, stone or grass, nor any enchantment, sorcery or witchcraft, whereby the law of God may be abased, or the law of the devil exalted, so help me God and his saints."*

The battle being thus begun, the combatants were bound to fight until the stars appeared in the evening. If either was killed, or if either yielded, and pronounced the horrible word *craven,* judgment was given for the victorious party; but if the battle was waged to the stars, and was a draw, the judgment was for the defendant, for he was in possession.

At the council of Northampton in 1175, Henry instituted the second possessory assize, the assize of *mort d'ancestor.* Its theory was that if a man died in possession of land, and was not holding as a mere life tenant, his heir was entitled to obtain possession, even though the better right to the title might be in another. Under this assize, the questions whether the dead man died seised, and whether the claimant was his heir, were to be decided by the verdict of an inquest of neighbors.

About the same time Henry provided the assize of *darrein*

presentment, which stands to the writ of right of advowson as the assize of *novel disseisin* stands to the writ of right for land.

It thus appears that during the reign of Henry II, and guided by his genius for practical reforms, the inquest made its way into ordinary procedure. In proprietary actions for land the defendant could reject battle and put himself upon the *grand assize,* and a jury would declare who had the better right; and in four classes of possessory actions, which included the most numerous and important causes of that day, the plaintiff might begin his proceeding by a royal writ for one of the petty assizes, in which the issue would be tried by a jury instead of by battle.

The inquest of the assizes, however, was by no means the finished jury which we see to-day. The jurors were witnesses, who were selected on account of their familiarity with the facts in issue. The knowledge required of them was what they had obtained through their own perception, what their fathers had told them, or what they would trust as fully as they would trust their own senses. They exercised the judicial function of weighing and deciding, but the decision was based entirely on what they knew themselves. They were, therefore, both witnesses and triers. The evolution from witnesses and triers to triers alone, was through the process of gradually increasing the ways of adding to the knowledge which the jurors were supposed to have, until their function as witnesses finally became obsolete.

The stages of this evolution were about as follows: (a) Jurors had to possess personal knowledge of the facts. (b) They were allowed to inform each other. (c) Men specially qualified were selected, as a jury of cooks to try one charged with selling bad food, and a jury of lawyers to try a person charged with having called a judge a robber. (d) In disputes over the genuineness of a deed, the jurors were combined with the witnesses to the deed. (e) Other combinations of community-witnesses with business-witnesses. (f) The practice of exhibiting charters and other writings to the jury. (g) The charge of the court and the statements of counsel, the latter of which were treated as evidence. (h) Challenges to a juror were tried by the other jurors. This gradual process of obtaining knowl-

edge from outside sources continued until at last witnesses called by the parties were allowed to testify, and the jurors ceased to be witnesses at all.

The extension of the right of trial by jury was not by statutory enactment, but by gradual consent. As the times became more enlightened, people began to suspect that in trials by battle the victory was to the strong rather than to the just; that the ordeal was a superstitious barbarism, rather than an oracle of God; and that in trials by wager of law, which applied to all actions of debt on simple contract, and to actions of detinue, a defendant who was willing to swear that he did not owe or detain, could usually find eleven compurgators equally willing to swear that they believed he spoke the truth. And the principle gained ground that, if in any action the litigants by their pleadings came to an issue of fact and agreed to be bound by the verdict of a jury, they would be bound accordingly,—a principle greatly aided by the attitude of the judges, who, in the course of time, drove litigants into such agreements by saying, "You must accept your opponent's offer of a jury or you will lose your cause."

This expansion by enforced consent may easily be illustrated. Take, for example, the assize of *novel disseisin*. The jurors, or recognitors as they were then called, have been summoned to say whether A disseised B. But A asserts, by way of exception, that the assize ought not to proceed, because B gave the land by feoffment to A's villein, who surrendered it to A, who entered by reason of such surrender. If this assertion is true, A did not disseise B. A desires that the question to be submitted to the jury should be the question which he has defined. If B consents to this change, there is no difficulty. But the judges say that B ought to consent, and that, if he will not, his action should be dismissed, for his case is that he was disseised by A, and this could not have happened if A's story is true. Moreover, as the plaintiff invoked the jury to decide a question submitted by himself, he ought not to be heard to object to the same jury deciding a question tendered by his adversary. Thus it became a common thing for a litigant to find himself compelled, on pain of losing his action, to accept his opponent's offer of submission to a verdict.

Where the assizes of Henry II did not apply, and where a party would not consent to a jury, the old modes of trial prevailed, and some of these continued for centuries. But this led to the invention of new forms of action, which invariably contemplated the interposition of a jury. Indeed, in the hands of the second or third generation of professional pleaders, the whole system of pleading had crystallized in a new form, the center of which was trial by jury. And this method of trial was so favored by the crown, by the judges and by the people themselves, that it came to be regarded as the regular common law mode of trial, always to be had where no other was fixed.

It is evident from the foregoing brief sketch that trial by jury is one of the oldest institutions known to the law, its origin running back to the Frankish inquisition, if not to the commissions inaugurated by Charlemagne. It has survived every mode of trial that was contemporary with the formative period of its growth and development. Venerable with age, and splendid in the history of its achievement, it has won the esteem of all classes of people, and found a guaranty in every American constitution. And it is an object of peculiar pride and affection to the bar, for it was fashioned by lawyers, under the auspices of the judges, with practically no aid from legislation other than the limited ordinances of Clarendon and Northampton, issued by Henry II more than seven hundred years ago.

But the very esteem and veneration which we have for trial by jury has a tendency to prevent any real improvement in the system. There is a feeling, especially among lawyers, that to lay hands on this revered institution, though for the laudable purpose of increasing its efficiency, is a sort of desecration, which ought to be discountenanced if not condemned. The result is that while, in the steady march of progress, almost every department of the law has felt the impulse of enlightened reformation, and even the fundamental principles of government have undergone in some instances a revolutionary transformation, trial by jury has merely marked time, and fallen in the rear of the general advance. Incomparable as it is, it nevertheless requires adjustment to modern conditions to make it entirely responsive to modern needs.

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